POLICE ACADEMY

715 McBride Blvd. New Westminster B.C. V3L 5T4

# IN SERVICE:10-8

JUSTICE INSTITUTE OF B.C.

**A newsletter devoted to operational police officers across British Columbia.**

## TRINITY OF SPECIFIC, OBJECTIVE FACTS AMOUNTS TO ARTICULABLE CAUSE

### R. v. Coles, 2002 PESCTD 36

A police officer stopped the accused after he had followed him drive at a speed well below the speed limit, signal well in advance of his turn, and proceed through a crosswalk just as a pedestrian entered it. As a result of the interaction with the driver, the officer formed the opinion he had sufficient grounds to make a demand for samples of his breath. Subsequent samples provided were in excess of the 80mg% limit. At trial, the judge found the detention was arbitrary and contrary to s.9 of the *Charter*. As a consequence, the evidence of impairment and certificates of analysis were excluded as evidence and the accused was acquitted. The Crown appealed to the Prince Edward Island Supreme Court arguing the judge erred in finding that the accused was arbitrarily detained.

Supreme Court Justice Campbell framed the question on appeal as "whether there was satisfactory reason for the police officer to stop this particular vehicle on that night, as opposed to any other vehicle on the road". Such a reason could arise from either a "presumed breach of a statutory provision" or from a common law articulable cause detention. If neither could be justified, then the detention would be arbitrary.

### Statutory Authority

Unlike other provinces (such as British Columbia and Ontario), Prince Edward Island's motor vehicle legislation does not authorize the random stopping of motorists. However, s.10(1)(d) of its *Highway Traffic Act* does empower the police to stop drivers where they have a reasonable belief the vehicle is being operated contrary to the *Act*. In assessing whether an officer has a reasonable belief, the Court must look beyond the subjective belief of the officer (he had an honestly held belief that an offence had been committed at the time he stopped the vehicle) and also consider objective criteria. This objective assessment, does not however, require the technical assessment of the precise parameters that would be undertaken by a court in deciding if the driver was guilty or not. In other words, "the Crown does not have to prove "beyond a reasonable doubt" that the officer's belief was "reasonable"". Nor is it necessary to determine that the officer was "correct"; it is simply a test to determine whether there was an objective foundation for the officer's subjective belief.

In this case, the officer's attention to the vehicle was heightened because it was traveling below the speed limit and had prematurely signaled a turn. Although neither of these actions themselves were offences in the officer's mind, the officer did have a reasonable belief the driver failed to yield to a pedestrian. Furthermore, s.10(1)(c) of the *Act* permits a police officer to direct traffic to ensure safety of the highway. This would allow the officer to stop the accused if he believed the accused's action was a public safety hazard, which was the case. The stopping of the accused was therefore not arbitrary, random, or without foundation.

### Common Law Authority

Under the common law, the police may stop persons where they have an articulable cause, which has been defined as "a constellation of objectively discernable facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation[1]". In concluding that the officer had an articulable cause to stop the accused, Campbell J. stated:

> There were three specific, objective, discernable facts, namely the slow driving, the early signalling, and the alleged failure to yield that caused the police officer to select the [accused's] vehicle. It was not a hunch. It was not a random stop. There was a rational foundation for the detention. It was not a[n] arbitrary detention…

[1] R. v. Simpson (1993) 79 *C.C.C.* (3d) 482 (Ont.C.A.)

And further:

> I am of the opinion that the three specific and articulable observations, when taken together with rational inferences from those facts, would constitute objectively discernible facts and provide reasonable grounds to suspect the driver to be impaired. The fact that, subjectively, the officer did not connect the three observations and suspect impairment does not preclude finding, on an objective analysis, that there were grounds to suspect impairment, and therefore, grounds to stop the [accused].

As a result, the Crown's appeal was allowed and a new trial was ordered.

# SEIZURE OF DETAINEE's CLOTHING 12 HOURS AFTER ARREST REASONABLE

## R. v. Stubinski (No.1), 2002 BCSC 612

Police attended a residence in response to a 911 call to find a person, who was being treated by ambulance attendants outside on the sidewalk, alleging she was assaulted by the accused who was apparently inside the home. Several people were living in the residence, including the accused and the complainant who slept on a mattress lying on the dining room floor. They also shared a bathroom with three other residents of the house. Police knocked on the door and were told the accused was asleep on the mattress. The police woke up the accused, confirmed his identity, and requested he come outside. The accused was subsequently arrested for assault at 10:20 pm, handcuffed, and transported to the police detachment. The complainant was further interviewed at the police office and told police she had been sexually assaulted. The following morning, at about 9:00 am, the police re-attended the home and interviewed one of the other residents of the house in the police car. He reluctantly told police he had seen a toilet bowl plunger being used in the assault. After the interview, the officer followed the resident back into the house and asked where the plunger was. The resident stated he did not know, but the officer continued to follow him into a bathroom on the main floor where he pointed out the plunger. The officer noted a reddish stain on the handle of the plunger, which was thought may be blood. Without a warrant, the officer seized the plunger.

The officer then returned to the police office at 10:30 am where he asked the accused, who was being photographed in the identification section, to remove his shorts. The officer, again without a warrant, seized the shorts. The accused challenged the admissibility of the plunger, the DNA evidence derived from it and the shorts, arguing that the warrantless search and seizures were unreasonable and violated s. 8 of the *Charter*. The Crown countered that the search and seizures, although warrantless, were nonetheless reasonable as an incident to lawful arrest.

### The Plunger

For a search and/or seizure to be reasonable as an incident to arrest, the search must be truly incidental or connected to the arrest. Although the officer had a proper purpose in searching the bathroom, to discover evidence, the search did not flow from the arrest the preceding evening. At or about the time of the arrest, the police had no intention of searching the residence and "no effort was made to secure the residence when the police left it despite the fact other people lived in the house". It was not the arrest of the accused that caused the police to search the bathroom, but the information received the following day from the other resident of the house. In short, the search for and seizure of the plunger was unreasonable because it flowed from witness information received about eleven hours after the arrest, not from the arrest itself, and therefore could not be justified as an incident to lawful arrest. The plunger and any derivative DNA evidence resulting from its examination was ruled inadmissible under s. 24(2) of the *Charter*.

### The Shorts

Although the shorts were seized almost twelve hours after the arrest, their seizure was incidental to the arrest. Justice Tysoe opined, at para. 31:

> [The accused] was in the custody of the police from the time of his arrest to the time of the seizure and he was still being processed at the RCMP Detachment when the shorts were seized. Although there was a longer period of time between the arrest and the seizure of the shorts than there was between the arrest and the seizure of the plunger, the normal dealings by the police with an accused person following arrest had not yet come to an end when the shorts were seized and the seizure formed part of the arrest process. I rule that the seizure of the shorts did not violate s. 8 of the Charter.

Complete case available at www.courts.gov.bc.ca

# REMOVING LUGGAGE FROM CONVEYOR BELT UNREASONABLE

## R. v. Truong, 2002 BCCA 315

The accused and a traveling companion, who were at an airport's departure level awaiting a domestic flight out, attracted the suspicion of the police. Their behaviour and luggage type fit the profile of a drug courier. The officer who watched them check in contacted other officers who were located in an area to which their baggage would be sent along a conveyor belt. The accused's bag was removed from the conveyor belt and set on the ground so that a police dog could sniff the bag. The dog indicated on the bag and the officers could also smell the odour of bleach, often used to mask the smell of marihuana. The accused was arrested and the bag was opened. In the bag police found 52 pounds of marihuana. At trial, the judge held that there was no violation of the accused's s. 8 *Charter* right and convicted the accused. The accused appealed, arguing that the police had no lawful authority to take control of the bag by removing it from the conveyor belt and place it on the ground. This, it was suggested, was a breach of s. 8 and the resultant evidence should be inadmissible. The constitutionality of the dog sniff was not argued.

The majority of the British Columbia Court of Appeal (2:1) held that although the police were acting to intercept contraband at the airport, at the time the bag was removed from the conveyor "the police were acting on a suspicion" and "had no reasonable…grounds to believe that the [accused] had committed an offence". Passengers who check their luggage for domestic flights do not expect that the police will handle it for general investigative purposes. They entrust their luggage to the airline for safe transport to the intended destination and only properly conducted searches for security are authorized under statute (*Aeronautics Act*, *Air Carrier Security Regulations*). However, this statutory power to search for air safety does not eliminate the right against intrusions for criminal investigation purposes. Donald J. stated:

> I think most passengers would feel their privacy was invaded if at the check-in booth the police took away their luggage to be sniffed by a police dog. What occurs unseen, apparently as a matter of routine, at the Vancouver International Airport takes place without the consent of the travelling public. I do not accept that by checking their luggage for domestic flights passengers surrender control of it for <u>all purposes</u>. (emphasis added)

In this case, the police were acting only on a suspicion and did not have the authority to take the bag from the conveyor belt and remove it from the control of the airline. The seizure was conducted without a warrant and was therefore unreasonable. However, the investigatory seizure was minor and the evidence was admissible under s. 24(2).

Although agreeing with the majority that the evidence should be admissible, Newbury J. disagreed with the majority on the analysis of the accused's privacy interest in his luggage:

> In my view, it would be slicing the cheese too fine to find that a person checking in for a flight at Vancouver International Airport would expect that his or her luggage would be searched for purposes of air safety, but would nevertheless have a reasonable expectation of privacy for other purposes. One either has a reduced expectation of privacy or one does not. Airports are obvious conduits for the smuggling of everything from banned seeds and plant materials to currency to illegal narcotics. To suggest that when one travels by air one has a lower expectation of privacy because of security issues but not because of issues of smuggling and illegal activity, is simply to ignore modern realities.

Newbury J. also noted that if a person can be briefly detained for investigative purposes on a standard of articulable cause, a similar standard to move the bag off the conveyor belt to permit a police dog to sniff it would also be arguably justified where "objectively discernable" facts exist. The accused's appeal was dismissed.

Complete case available at www.courts.gov.bc.ca

## Note-able Quote

*"The Charter right to silence comes into play when a person is caught within the state's control. Underlying that right is the principle that a person who is detained by state authority has the continuing right to decide whether to make a statement to persons in authority, provide evidence against himself, or remain silent. A person who is not within the state's control does not need protection from the state's coercive power"* [2]
BCCA Justice Huddart

[2] R. v. M.C.W. 2002 BCCA 341

## EXPLANATIONS OFFERED IN COURT IRRELEVANT TO FORMING OF OPINION

**R. v. Harder, 2002 SKQB 216**

A police officer observed the accused's vehicle weaving within its lane and barely cross a centre and shoulder line on four occasions as it ascended a hill. The officer activated his lights and the accused promptly came to a stop. He immediately and without difficulty produced his licence and registration to the officer. The officer detected an odour of alcohol coming from the accused at the time he was seated in his vehicle. Further, the accused admitted to having consumed alcohol, appeared docile or perhaps tired, and did not appear to be acting in a "completely normal manner". The officer demanded the accused provide a sample of his breath. Later, when the officer asked the accused to be seated in the police car and breath in his direction, the officer detected an extremely strong odour of liquor. The accused was convicted at trial of driving with a blood alcohol level in excess of 80mg% but appealed to the Saskatchewan Court of Queen's Bench arguing that the taking of the samples violated his right to be secure against unreasonable search and seizure and should be excluded as evidence because the officer did not have the necessary reasonable and probable grounds to demand them.

The test for determining the existence or absence of reasonable and probable grounds to make a demand was summarized by Kovach J. as follows:

> The Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base a demand. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the demand. On the other hand, the officer need not demonstrate anything more than reasonable and probable grounds. Specifically, the officer is not required to establish a prima facie case of impaired driving before making a demand.

In assessing whether the officer had reasonable and probable grounds to make the demand, the trial judge erroneously considered the strong odour of liquor detected on the accused's breath after the demand was made. Post demand observations cannot be considered when reviewing the presence or absence of reasonable and probable grounds. However, the difference between the odour detected at the window and the extremely strong odour detected after the demand was insufficient to remove the objective justification for the demand. Even though the trial judge erred in considering the post demand observations, the remaining grounds relied upon were justifiable from an objective point of view. The results of the breath tests were admissible as evidence.

The accused also testified during the trial *voir dire* explaining away many of the officer's observations concerning his appearance and driving which were consistent with sobriety. On this issue, Kovach J. concluded:

> [T]he explanations provided in testimony had not been proffered to the constable at any time, either prior or subsequent to the demand. Had the explanations been proffered, the constable would have been required to consider them, together with all other information available to him, prior to formulating his opinion.

The Saskatchewan Court of Queen's Bench refused to interfere with the trial judge's verdict, the accused's appeal was dismissed, and the conviction was upheld.

Complete case available at www.lawsociety.sk.ca

## 59-MINUTE DELAY BETWEEN ARREST & BREATH DEMAND PROPER

**R. v. Squires,**
**(2002) Docket: C37147 (OntCA)**

A police officer responded to a report of a rollover accident and found the accused lying on his back in a ditch about 15 metres from the overturned crushed car. As the accused attempted to sit up, the officer was concerned about possible injuries and convinced the accused to lie down. The officer immediately noted blood on the accused's face and a smell of an alcoholic beverage as the accused mumbled "gibberish". The officer formed the opinion that the accused was the driver of the vehicle and arrested him for impaired driving at 1:03 am. Ambulance and fire personnel arrived and the accused was transported to the hospital arriving at 1:35 am. At 1:56 am the attending physician advised the officer that he could speak to the accused. The

officer then read the accused his right to counsel in relation to the impaired driving (which he indicated he understood and declined to contact a lawyer) and the official warning followed by the breathalyzer demand at 2:02 am (59 minutes after the arrest). The accused was presented to a qualified breathalyzer technician and after three attempts failed to provide a sample.

At trial, the accused was acquitted of impaired driving, dangerous driving, and refusing to provide a breath sample because the judge was not satisfied beyond a reasonable doubt that the accused was the driver of the vehicle. Despite the officer having reasonable and probable grounds, the accused was under no legal obligation to take the breath test because there was insufficient evidence to support he was the driver. The Crown successfully appealed to the Ontario Superior Court of Justice. Frate J. held that the trial judge erred in concluding that once he formed a reasonable doubt whether the accused was driving, the accused was no longer obligated to provide a sample. Furthermore, even though the demand occurred 59 minutes after the arrest, it was nonetheless made as soon as practicable under the circumstances. The case was sent back to the trial judge to enter a conviction with respect to the refusal to provide a breath sample and sentence the accused. The accused further appealed to the Ontario Court of Appeal arguing that the Superior Court Justice erred in concluding that the officer had reasonable and probable grounds to arrest the accused for impaired driving and that the demand was made as soon as practicable.

### Reasonable and Probable Grounds

"Reasonable and probable grounds" under s.254(3) of the *Criminal Code* requires a subjective belief by the officer that must be objectively justified. Here, the police relied upon an odour of alcohol, glassy eyes, slurred speech, and disorientation in addition to the fact there was a crushed car involved in a single vehicle accident with an injured man lying in a ditch 15 metres from the car approximately one minute after the accident; all which occurred on a clear night in a quiet rural community. Doherty J. for the unanimous Court of Appeal held that any reasonable person would reach the conclusion that the officer had reasonable and probable grounds to arrest the accused for impaired driving.

### As Soon as Practicable

Section 254(3) of the *Code* requires that the demand for breath samples be made "forthwith or as soon as practicable" after the police have formed their opinion that reasonable and probable grounds exist. Although the demand was not made "forthwith" (it was made 59 minutes after arrest) it was made "as soon as practicable" (which has been synonymously interpreted to mean "within a reasonably prompt time" and not "as soon as possible"). The officer acted professionally and humanely when he postponed the additional legal steps following the arrest in the interest of the accused's health. Furthermore, the officer acted in accordance with the legal requirement that the demand and *Charter* warnings be given "once an accused is able to understand the questions and respond to them in a meaningful way". The demand was lawful and the appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

## USE OF 37mm GAS GUN NEGLIGENT: POLICE PARTIALLY LIABLE FOR DAMAGES

**McLean v. Seisel et al.,**
**(2002) Docket:98-CV-159410 (OntSCJ)**

The plaintiff sued the police as a result of personal injuries suffered when she was rendered legally blind in her left eye after police discharged tear gas from a 37 mm gas gun in an effort to apprehend her. Members of the plaintiff's family also made claims under Ontario's *Family Law Act* for loss of guidance, care, and companionship. The 33-year-old plaintiff, who was diagnosed with a schizoaffective disorder, suffered periodic episodes of psychotic behaviour lasting a few days because she refused to comply with a drug regimen. Incidents included wandering in the street, wandering into another person's residence, talking to herself, rambling incoherently, lunging at a police officer with a knife, setting fire to her apartment, attempting suicide, and assaulting a 12 year old girl. Inevitably, the police would be called, she would be apprehended under the *Mental Health Act*, taken to a psychiatric facility for treatment, and released after being treated with sedatives and psychotic drugs.

The plaintiff's mother, sensing her daughter was heading for a relapse, called the police to apprehend her before she deteriorated. The police attended, but left after determining she was fine. Later that evening the police re-attended after receiving a complaint that the plaintiff threatened a neighbour and her children. Police observed swastikas written with red lipstick on the plaintiff's windows, a cross and "666" written in red lipstick on her door, and fresh white paint on the door handle. After knocking on the door and attempting to communicate without success, the attending officer attempted to open the door but found it had been barricaded with furniture. Opening the door slightly, the officer introduced pepper spray into the apartment hoping the plaintiff would exit as a result. The plaintiff responded by throwing objects at and through the door.

The officer contacted the Emergency Task Force (ETF) for assistance and eight ETF officers attended. The officers entered the apartment and discharged a 37 mm (muzzle blast) gas gun. The plaintiff ran into the bathroom and locked herself in. A second muzzle blast was discharged 5 minutes later, from outside the apartment, through the bathroom window within less than 3 feet of the plaintiff's face as the plaintiff was seated on the toilet. At this time other ETF members entered the bathroom and took the plaintiff into custody. It was this second discharge that left the plaintiff legally blind in her left eye.

In assessing whether the police were negligent, Dyson J. of Ontario's Superior Court of Justice posed the following questions:

- Did the police act reasonably under the circumstances?
- Did they know or ought they to have known that acting as they did would result in serious injury to the plaintiff?
- Were less lethal approaches to the apprehension of the plaintiff obvious and available?

Prior to the second discharge of the gas gun, an officer could hear the plaintiff talking unintelligibly to herself. She was contained in a very small room, did not pose a physical threat to the police or herself and at no time did anyone observe her with a knife in her hand. Furthermore Dyson J. found other less lethal options "such as merely making loud vocal noises, putting one's face which is covered with a gas mask into the window, prodding the plaintiff with a baton, or the use of "pepper spray" were not used. A firearms and tactics instructor testifying for the plaintiff provided an opinion that the muzzle blast was "dangerous and inappropriate" because there was no real safety problem for the heavily protected ETF officers with the 120 lb plaintiff seated on the toilet talking to herself. The officers could have simply burst through the door and arrested the plaintiff who would not have been able to react in time to pose a danger. Another plaintiff witness, an ex-police officer and former ETF leader testified the police failed to adequately negotiate with the plaintiff. Furthermore, the police failed to comply with their own procedure manual which endorses the use of tear gas "when all options have been totally exhausted and negotiations have completely broken down or if other circumstances dictate…".

In recognizing that the police perform "an unenviable but necessary service for the protection and safety of the community and the emotionally disturbed person involved", the Court concluded that the police were partially responsible for the plaintiff's injuries:

> [T]he firing of the second muzzle blast into the bathroom was unreasonable, unnecessary, excessive and constitutes negligence on the part of the police. I find the police negligent in using the muzzle blast weapon when less lethal means were available. Further, I find that the police knew or ought to have known that by firing the muzzle blast at such close range serious personal injury was probable. Also, I find that the police were negligent in failing to follow the prescribed procedure outlined in their own manual with respect to mediation.

Having found the police negligent, Dyson J. also found the plaintiff 50% at fault because it was through her conscious decision to discontinue drug therapy that precipitated the behaviour which lead to the police intervention and the resulting incident. The plaintiff was awarded $56,500 in damages for pain and suffering, permanent physical injury, loss of sight, disfigurement, and psychological trauma. The plaintiff's mother received $5,000, the plaintiff's sister received $2,000, and the plaintiff's daughter received $4,000 for loss of guidance, care, and companionship.

## Note-able Quote

*"You can easily judge the character of a man by how he treats those who can do nothing for him"* Goethe, 18th/19th century German poet, novelist, playwright, and philosopher

## SUSPECT NOT DETAINED: UNDERCOVER POLICE TRICK ACCEPTABLE

**R. v. Cooper, 2002 ABCA 141**

The accused, who was convicted of murdering two children he was babysitting, appealed his convictions arguing he was denied his right to silence under s. 7 of the *Charter* and further, that the investigative methods used by the police were so oppressive his statement was not voluntary. Following the accused's arrest, he refused to make a statement while he was in custody. An undercover officer was placed in a holding area with the accused and offered him a place to go after he was released. Although the accused could have stayed at other places in town, he chose to go with the undercover officer and his partner to an apartment following his release. The undercover officer offered the accused a couple of "weak" alcoholic beverages and was questioned repeatedly about the incident. Although he initially stated he did not want to talk about it, the accused eventually made an inculpatory statement.

The right to silence protected under s. 7 of the *Charter* prevents the police from denying a person, under their control during the criminal process, the choice of whether to speak or not. This may include the use of tricks. In this case, the accused was not detained, either physically or psychologically, which would have rendered him under police power.

The common law confessions rule requires that statements made to persons in authority must be voluntary. However, the accused was not under the impression he was speaking to a person in authority and therefore the confessions rule did not apply. The appeal was dismissed.

Complete case available at www.albertacourts.ab.ca

## POSSESSING A FIREARM: A PRIVELEGE, NOT A RIGHT

**Firearms Act and Reeves, 2002 BCPC 0181**

A firearms officer refused an application for a firearms licence on the basis of the applicant's "history" of violent and criminal behaviour for the "murder" of his wife 21 years ago. The applicant sought review of the decision in the Provincial Court of British Columbia arguing that the firearms officer had erred. The test on review to the Court was not whether the judge would or would not grant a licence, but whether the officer had reasonable grounds for not granting it. Although the officer improperly used the word "murder" (he should have used the word "killing" because the applicant was convicted of manslaughter), Smith J. found that the possession of a firearm is a privilege, not a right, and the officer acted within the scope of his authority and would have been wrong to grant the licence based on the applicant's background. The application was denied.

Complete case available at www.provincialcourt.bc.ca

## TIME OF ACCIDENT INFERRED FROM FACTS

**R. v Jinks, 2002 BCPC 0176**

A police officer attended the scene of a single vehicle accident where a vehicle operated by the accused had ended up overturned in a ditch a short distance from a local pub. A nearby resident attended the accident after hearing tires squealing and a loud bang. She found a vehicle flipped upside down in a 10 ft. deep ditch with the engine running. She yelled for her son to call 911, and with the help of another motorist, assisted the sole occupant (the accused) from the driver's door and out of the ditch. The accused fell over into some brambles and mud as he tried to get onto the highway from the ditch. Paramedics attended and the accused initially misidentified himself. Following a head-to-toe medical examination, the accused signed a waiver refusing to go to the hospital. A police officer soon arrived and spoke to the ambulance driver who informed the officer that the accused was the driver and sole occupant of the vehicle, had alcohol on his breath, had supplied an incorrect name, had been with the nearby resident until the ambulance arrived, and had not consumed anything after the accident. The officer could smell liquor on the accused's breath, observed that the accused was exhibiting poor balance, staggering, swaying, was talkative, and had watery eyes. Furthermore, the paramedic who checked over the accused told the officer there was no medical need to transport the accused to the hospital against his wishes.

The officer began his investigation, advised the accused he was being detained for impaired driving and driving over the legal limit, provided his *Charter* rights, and demanded breath samples. The accused argued that the officer did not have reasonable and probable grounds to believe that the alleged offences had taken place within the previous 3 hours, as the demand section requires. The Crown argued that the only logical conclusion considering the time of the 911 call, the instant dispatch of the police, the scene found by the officer, and that the accused was being treated by the ambulance attendants was that the accident occurred within the 3 hour limitation. The trial judge agreed with the Crown and found the accident had taken place well within the previous three hours prior to the officer forming his opinion. Thus, the officer's conclusion that care and control occurred within the preceding 3 hours was reasonable. Moreover, the officer had the necessary grounds to make the demand; he observed the accused's symptoms, which were objectively sustainable after review. After considering all of the evidence including that of the nearby resident, the attending paramedic, and the police officer, the accused was convicted of impaired driving.

Complete case available at www.provincialcourt.bc.ca

## PASSENGER IN CAR HAS NO STANDING TO ARGUE s.8 *CHARTER* BREACH

**R. v. Campbell, 2002 ABQB 380**

A police officer on foot patrol observed a car been driven in which the accused, the front passenger, was talking on a cellular telephone. The rear passenger was acting rather frantically upon seeing the officer. The car pulled into a park lane near a hotel and the officer saw a man lean in towards the window of the vehicle. As the officer walked closer to the vehicle, it sped away with the driver failing to signal lane changes on at least two occasions. The foot patrol officer called for assistance and the vehicle was stopped by other police officers. While speaking to the occupants, police noted the rear passenger had difficulty speaking as if he had something in his mouth. Police subsequently seized two spitballs of cocaine. The driver/owner of the vehicle had $240 in his pocket while another $180 was found in his wallet and packaging for cocaine was located under his seat. A cellular telephone was found on the rear seat next to the back passenger. Two incoming telephone calls to the cellular were answered by police and the callers used language commonly used to purchase cocaine. The was charged with possession of cocaine for the purpose of trafficking and possession of proceeds of crime (cash). The accused argued, in part, that he had "third party" standing to challenge the admissibility of the evidence obtained in violation of the other vehicle occupants' *Charter* rights.

Section 8 of the *Charter* protects a person from unreasonable search or seizure. This right however, does not protect a person from all intrusions into their privacy by the police, but only when they have a reasonable expectation of privacy. The accused, or applicant in the exclusion of evidence, must first establish that they had a personal (or individual) expectation of privacy in the place searched or item seized. In using the relevant factors identified by the Supreme Court of Canada in assessing a reasonable expectation of privacy, Alberta Court of Queen's Bench Justice Lee found that although the accused was in the front passenger seat of the car using a telephone, he did not have a reasonable expectation of privacy. He did not have possession or control of the property, he did not claim ownership, nor did he have the ability to regulate access to the vehicle. In rejecting the accused's further argument that because he was an alleged partner in the dial a doper scheme he had "a reasonable expectation of privacy in the evidence tendered against him", the Court held that the expectation of privacy must be established at the time of the search, not later on because the rights of two other persons involved with the accused may have been infringed. The accused was unable to demonstrate any identifiable legal interest in the property seized from the other two persons or from the vehicle. Thus, the accused "failed to establish…any interest in the searches conducted…other than a desire to exclude the evidence" and his application was dismissed.

Complete case available at www.albertacourts.ab.ca

### Note-able Quote

*"In law a man is guilty when he violates the rights of others. In ethics he is guilty if he only thinks of doing so".* Immanuel Kant, 18th century Prussian geographer and philosopher.

# KNOCK ON DOOR TO GATHER EVIDENCE UNREASONABLE

**R.v Boughner,**
**(2002) Docket:C34662 (OntCA)**

Members of a joint forces drug unit received reliable information that the accused was a mid-level cocaine supplier in the area and that a Mr. Morden was a street level dealer and one of the accused's customers. The police conducted surveillance of a motel where a pickup truck belonging to the accused was observed. After observing several vehicles enter the parking lot and the occupants enter and leave room 29, the police stopped a car leaving the motel after its passenger entered the unit and exited 2 minutes later and drove away. As the police approached this car, a passenger swallowed a piece of paper believed to be a packaged fold of cocaine. No drugs were recovered. Police continued surveillance of the motel room and observed the accused (who at the time they believed was Mr. Morden) leave and return to the unit. The police did not believe they had sufficient grounds to obtain a search warrant for the motel unit because they did not recover any cocaine from the car they stopped. Shortly before midnight, the police decided they would knock on the door to identify the occupants and seek permission to search the room. The officers intended to "freeze the room" if Mr. Morden answered the door by using as much force as necessary to enter and arrest him for a drug offence. The police would then apply for a search warrant.

The police knocked on the door and when asked who was there by a man who came to the window, replied "Mike". The man opened the door a few inches and the officer held up his badge and identified himself as a police officer. The man, appearing shocked, his eyes nearly doubling in size, slammed the door closed. Police recognized the man as the accused, kicked in the door and yelled "Police". The accused ran to the back of the room and yelled something about a gun. The officers vacated the motel room and took cover in the parking lot. A couple of minutes later the accused emerged from the motel unit, surrendered to police, and was arrested for possession of cocaine for the purpose of trafficking. The police re-entered the room to ensure there were no other occupants and to search for the gun. The toilet was running and several items associated with drug trafficking and the use of cocaine were observed, but the gun was not found. A second search was conducted and 66 grams of cocaine and $1000 in cash were found hidden in the bathroom. The accused's wife later turned over a loaded handgun she had removed from the room.

At trial, the accused made a motion to exclude the cocaine, money, handgun, and drug paraphernalia seized from the motel room. The trial judge held that the police seriously breached the accused's privacy right under s.8 of the *Charter* by knocking on the door. However, he also found that the accused's reaction at the door provided exigent circumstances that evidence might be destroyed and the further utterance about the gun provided additional grounds for arrest in relation to a weapons offence. The searches of the motel room were thus incidental to lawful arrest. Despite the original breach, the trial judge held that the exclusion of the drug related evidence was not warranted. Moreover, the gun was not obtained in a manner that violated the accused's rights. It was turned over to the police after the completion of the searches, by the accused's wife who had it in her possession. Consequently, the accused was convicted.

The accused appealed to the Ontario Court of Appeal arguing, in part, that the trial judge erred in relying on the accused's reaction at the door to provide exigent circumstances and in finding that he was arrested lawfully. Further, even if he was lawfully arrested for drug offences, the search was for a gun and was not a lawful incident to arrest. Laskin J., writing for the unanimous appeal Court, found the trial judge erred in holding that the police entered the room lawfully. In finding "that the purpose of knocking on the motel room door was to secure evidence against the occupants", the trial judge was correct in concluding that the door knock was unlawful. Allowing "the police to "bootstrap" their justification for entering the motel room based on illegally obtained evidence" was improper. On the other hand, when the police heard the accused shout something about a gun the circumstances facing the police significantly changed and now involved an "immediate public safety concern". Whether the police were entitled to lawfully arrest the accused at this point was not so clear. Ontario's highest court found it unnecessary to conclusively determine this issue. Even if the trial judge erred in admitting the evidence, no substantial wrong or miscarriage of justice occurred. The evidence of the accused's wife was sufficient to warrant a conviction

without the admission of the physical evidence. The accused's conviction appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

## POLICE ENTRY TO CHECK FOR MISSING PERSON UNLAWFUL: BUT EVIDENCE ADMITTED

**R. v. Rhodes, 2002 BCSC 667**

The police, investigating the disappearance of a man, attended the accused's residence because it appeared she was the last person to see or talk to him and she had his car and keys. The landlady attended the residence with the police and agreed to unlock the door. The police observed that the windows were closed, the curtains were drawn, and there was no car in the driveway. Prior to entering, the officers knocked loudly and yelled "Police" several times. Upon entry, the police found the body of the missing man in the living room, obviously the victim of foul play. The police immediately secured the residence and posted an officer outside. A search warrant was subsequently obtained on the strength of the warrantless search. Following the execution of the warrant, the police took photographs of and videotaped the crime scene. In addition to the man's body being taken from the residence, police seized several items including an axe with blood matching the victim's DNA. During a voire dire on the charge of second degree murder, the accused argued, among other things, that the warrantless search of the residence was unreasonable and that the location, examination, and identification of the victim's body was inadmissible. Furthermore, the axe and other evidence obtained as a result of the tainted search warrant, along with any expert or opinion evidence derived from it, should also be excluded.

One of the attending officers testified he never considered obtaining a search warrant prior to locating the body of the victim because he did not know a crime had been committed nor did he believe he had reasonable grounds to obtain a warrant. He testified he entered the residence to check for the victim, the accused, and her children. He was acting on a hunch and did not know what he was going to find. The other officer also did not consider that there was a crime yet committed and testified she wanted to check the residence to ensure the accused and her children were not hurt. She chose to enter without a warrant because the victim was missing for several days under strange circumstances.

Stromberg-Stein J. of the British Columbia Supreme Court concluded that the initial entry of the police into the accused's residence was a warrantless search based on a mere suspicion or hunch. As a consequence, the information obtained from this unreasonable search must be excised from the information to obtain the search warrant and without it the warrant could not be supported. Thus, the searches and seizures at the accused's home become warrantless and a breach of the accused's s .8 *Charter* right.

In assessing whether the evidence should nonetheless be admissible under s. 24(2) of the *Charter*, the Court found the police acted in bad faith because "they knowingly, deliberately, wilfully and flagrantly violated the sanctity and privacy of the accused's home". The police acknowledged an absence of reasonable grounds and there was no evidence that the entry was motivated by a sense of urgency or necessity. Furthermore, there was no common law or statutory power permitting the police to enter the accused's residence even though the officers believed they had a common law power to check the residence to see if anyone was inside, either dead or alive. Stromberg-Stein J. concluded that the obtaining of a search warrant was not only impracticable, but impossible because the police had only a mere hunch or suspicion and not the necessary reasonable grounds. Despite these findings, the evidence was reluctantly admitted.

Complete case available at www.courts.gov.bc.ca

## INCIDENTAL SEIZURE UNREASONABLE: NOT RELATED TO ARREST

**R. v. Kitaitchik,**
**(2002) Docket:C32740 (OntCA)**

The accused appealed his second degree murder conviction to the Ontario Court of Appeal by arguing, in part, that the trial judge erred in admitting evidence that was obtained in violation of the accused's s. 8 *Charter* right. The accused, who was a suspect in the murder, was arrested at his home for possession of stolen property. A witness had received some property, belonging to the homicide victim, from

the accused and reported this to the police. The day after the arrest, the accused was taken from his cell to a private room and asked to remove all of his clothing. In exchange, the accused was given a fresh set of clothing obtained from his home. Several fibers found on the clothing were consistent with a ligature and sweater found at the murder scene. Although the investigating officer who ordered the clothing seized testified he did not have reasonable grounds to arrest the accused for the murder at the time, he stated that the seizure related to the murder investigation and not the possession of stolen property charge. However, he believed he had the authority to seize the clothing as an incident to the accused's arrest for the possession offence.

The trial judge concluded that the common law power of search incident to a lawful arrest did not allow the police to search for or seize items for offences unrelated to the reason for arrest. Here, the clothing was seized in relation to the murder and not in relation to the possession offence for which he was arrested. The search was not lawful as an incident to arrest and was thus unreasonable. However, the evidence was nonetheless admissible under s.24(2) of the *Charter*. The accused submitted that the trial judge seriously misapprehended the seriousness of the *Charter* breach and the effect of the exclusion of the evidence on the administration of justice. He argued that the accused was subjected to the equivalent of a strip search resulting in a violation of the most intimate of privacy rights. In rejecting the argument that the trial judge's assessment of the seriousness of the breach was unreasonable, Doherty J. for the unanimous appeal Court stated:

> [The accused] was not subjected to a strip search as described in R. v. Golden [(2001) 159 C.C.C. (3d) 449 (S.C.C.)]. While the seizure of his clothing was clearly an intrusive act, it was not akin to stripping him for the purpose of viewing or examining his most private areas. The seizure occurred in a private room with only one other person present. No force or intimidation was used and the [accused] was immediately provided with a fresh set of his own clothing. No attempt was made to examine the [accused's] body. The [accused] did not testify on the voire dire and it is sheer speculation to suggest that he was somehow humiliated or traumatized by the seizure.

And later:

> The seizure also occurred after a lawful arrest and the [accused] was lawfully in police custody. In such circumstances, a person has a reduced expectation of privacy.

The accused further argued that the judge erred in finding that the officer acted in good faith. He suggested that the officer should have known that he was not entitled to seize the clothing for a murder investigation as an incident to the lawful arrest for a different charge. Ontario's highest court stated that although "it is now clear that the power to seize as an incident of arrest does not extend to the seizure of material to provide evidence of an offence other than the offence for which the person was arrested", at the time of the accused's arrest (1991) the law in this regard was unsettled. The officer's belief that he could seize the clothing was not unreasonable. Furthermore, Doherty J. went on to add that the s. 8 violation resulted from the investigating officer not fully appreciating "the impact of the evidence in his possession and his authority to seize the clothing in relation to the possession charge". He stated:

> I would add two further considerations. First, even though the officer testified that he did not have reasonable and probable grounds to charge the [accused] with murder at the time he seized the clothing, I think, on any objective assessment, he had such grounds. There was a clear basis for inferring that the theft and the homicide were part of the same transaction. The officer had very good reason to believe that the [accused] was in possession of stolen property taken from the victim's apartment shortly after the theft and homicide occurred. The [accused's] possession of the stolen property so close in time to the theft and homicide provided reasonable and probable grounds to believe that he was implicated in the homicide. Second, although the officer did not purport to seize the clothing in relation to the possession charge on which the [accused] was arrested, the clothing was capable of providing evidence to support that charge. If the clothing placed the [accused] at the scene of the theft, it would provide cogent support for the charge that he was in possession of stolen property knowing that the property had been stolen.

As a result, the appeal court could not find that the trial judge erred in his assessment of good faith with respect to the conduct of the police. The appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

# KICK TO GROIN RUPTURING TESTICLE NOT EXCESSIVE

**Bolianatz v. Edmonton Police Service, 2002 ABQB 284**

The plaintiff sued police claiming damages for assault during an arrest. The plaintiff got into an altercation outside a downtown hotel with a male from whom he had been earlier ripped off in a drug transaction. A uniformed police officer observed the plaintiff on top of another male dealing blows to his head. The officer pulled his car partly onto the curb, exited his vehicle, identified himself as a police officer, and shouted at the two to stop fighting. After the men failed to respond to the officer's directions, the officer tried to grab their arms without success. The officer then grabbed the two by their collars and tried to separate them. When ordered to get to the ground, the second male complied. However, the plaintiff did not comply with the officer's demand, braced himself on the police car with one hand, and grabbed hold of the officer's gun belt with the other.

Bar patrons from across the street attended the area to watch what was occurring. The officer did not know if these persons were friends of the men but knew he had to get the situation under control. He considered calling for backup on his radio, but both his hands were occupied. He could use the baton or pepper spray on his belt, but he would have to release the other man who may have run away, could go after the plaintiff, or assault the officer. The plaintiff was too close for the use of pepper spray and the officer did not want to injure the plaintiff's eyesor receive splash back, which would render him defenceless. The officer chose to kick the plaintiff as hard as he could, striking him in the groin. The plaintiff was arrested, handcuffed and subsequently driven home after neither party wished to pursue charges. As a result of the kick, the plaintiff's testicle ruptured and after surgery was the size of a "pea" which made him feel like a "freak".

## Section 25(1) Criminal Code

Section 25(1) of the *Criminal Code* provides a defence to police officers, protecting them from criminal and civil liability, if they act on reasonable grounds and do not use unnecessary force. The onus for proving the justification lies with the police officer using the force. To claim a defence in s. 5(1) the officer must be "required or authorized by law to perform an act in administering or enforcing the law and that he acted on reasonable grounds". Reasonable grounds requires officers believing they have reasonable grounds and that their belief is objectively established on the evidence.

## Lawful Arrest

Bensler J. of the Alberta Court of Queen's Bench concluded that the officer could ground an arrest, thus be acting lawfully, in three ways:

- Assault: Section 495(1) of the *Criminal Code* allows the police to arrest persons they find committing a criminal offence. The officer found the plaintiff on top of the other man getting the better of him and the arrest was necessary to prevent the continuation of the assault.

- Assaulting a peace officer: During the officer's intervention, the plaintiff grabbed his gun belt. This was sufficient to provide the officer with reasonable grounds to restrain the plaintiff for the purpose of arresting him for assaulting a peace officer.

- Breach of the peace: A breach of the peace involves "an act or actions which result in actual or threatened harm to someone or where public alarm or excitement is caused". Section 31 of the *Criminal Code* allows an officer who witnesses a breach of the peace to arrest anyone they find committing the breach or who on reasonable grounds the officer believes is about to join in or renew the breach. Furthermore, at common law the police have the power to arrest or detain persons for apprehended breaches provided the officer has reasonable grounds the breach will be imminent and the risk of occurrence is substantial. In this case, the assault was clearly a breach and was attracting the attention of and generating excitement with the patrons from the bar across the street. The officer acted reasonably in believing that a "further breach of the peace was imminent and that risk that it would occur substantial".

## Section 27(1) Criminal Code

Section 27(1) of the *Criminal Code* permits anyone, including the police, to use force to prevent the

commission of an offence likely to cause immediate and serious injury to a person and for which the person may be arrested without warrant. Here, the use of force was necessary to prevent the plaintiff from assaulting the other man. Assault is an offence for which the person may be arrested under s.495(1) of the *Code* and the continued striking to the victim's head would likely cause immediate and serious injury.

### Excessive Force

The test for determining whether a police officer used excessive force will require an examination of a number of factors including "the seriousness of the offence, the heat of the moment, the conduct of the offender, and the availability of other means of arrest". However, "an officer is not expected to measure carefully the exact amount of force that the situation requires". The proper test is whether the force was objectively reasonable from the situation in which the officer found themselves. In this case, Bensler J. would "not second guess [the officer's] decision given the volatile situation in which he found himself" and concluded the officer was justified.

Complete case available at www.albertacourts.ab.ca

## CHRISTMAS CARDS DEMONSTRATE ATTITUDE OF OFFICER

### R. v. Detillieux 2002 BCPC 0212

A police officer and strike force member received information from two reliable sources that the accused was trafficking in methamphetamine and was spending some time in the area of an apartment known to the officer as an address where trafficking occurred and where he had previously arrested two or three people before, one for a drug offence. The officer was also told that two other people spending time at this apartment had outstanding warrants. The officer also received information from an outside agency that the accused was wanted on an outstanding warrant for careless use of a firearm and possession of a restricted weapon with ammunition. The officer and three other members set up surveillance on the apartment building to locate any of the three wanted persons without success. A week later, the officer was on his way home from the detachment when he saw the accused wearing a backpack and headphones leave the apartment building and step out onto the street. The officer drove around the block, parked his car, and proceeded on foot.

The officer observed the accused speaking to two young females and a brief hand contact between the accused and one of the females. When the two females separated from the accused, the officer who was in his civilian clothes and in possession of his badge, pepper spray, and a small flashlight, jogged up to the accused, and told him he was under arrest for the outstanding warrant. The officer patted down the accused and found an address/phone book and a large sum of cash in his pocket and a cell phone in his jacket. As the officer began to unzip the accused's jacket, he said he had a starter pistol in his pants, which the officer removed. The accused was Chartered and read the police warning from a card. The officer telephoned the police detachment for assistance and while awaiting the arrival of other officers, searched the accused's backpack where he found a large baggie of methamphetimine. The gun, a starter pistol modified to fire .22 calibre ammunition, was loaded. The accused was charged with drug and weapons offences. During the voire dire, the accused argued that he was subjected to an unreasonable search and seizure.

### The Arrest

The officer testified that he did not have reasonable grounds to arrest the accused for trafficking prior to the search. With respect to the arrest warrant, the officer testified he had not taken steps to update the status of the warrant since he had received the information 8 days prior to the arrest. The accused testified he had met the officer at the courthouse two days before the arrest and told him he was taking care of the warrant while the officer confirmed he had spoken to the accused at the courthouse, but could not recall the conversation about the warrant. The officer also agreed in cross examination that part of his duty as a police officer was to intimidate and scare people in an effort to create the impression he was watching them and would get them and send them to jail. The accused filed as evidence, five Christmas cards the officer had sent to persons he had arrested for drug related crimes stating, "We know you're dealing drugs. Stop it, or I'll arrest you". Pothecary J. held that the officer, if he had a reasonable belief the warrant was outstanding, should have arrested the accused at the courthouse. Furthermore, by not checking on the status of the warrant after that date, the officer did not act in good faith. The judge found that the officer

deliberately did not call the dispatcher before making the arrest so he would avoid finding out the warrant was no longer outstanding. Thus, the arrest was not lawful.

### The Detention

The police are entitled to detain persons for the purpose of investigation but may only search those persons for safety reasons, not evidence. The detention in this case was based on a "narrow suspicion" and therefore the officer did not have reasonable grounds to search for evidence of a drug transaction. Although the officer testified he searched for his safety, the trial judge held that it was a search for drugs and not a search for weapons. During the "apparent pat-down" of the accused, the officer removed items only logically connected to drugs, not safety. Furthermore, the officer's attitude as demonstrated by the sending of the Christmas cards, and his description of his police task, showed a deliberate and flagrant ignoring of persons rights. Pothecary J. stated:

> I am satisfied that [the officer] has taken it upon himself to "clean up Maple Ridge" and that he believes this is something he is entitled to do by any means necessary. I disagree with that interpretation of his job, his duties and his entitlements. This has caused me to seriously doubt the objectivity one expects of a trained and experienced police officer in making his observations, recording his observations, and later testifying to those observations when required to do so in court.

The *Charter* breach was ruled serious and the evidence was excluded.

Complete case available at www.provincialcourt.bc.ca

## SPECULATIVE INCIDENTAL SEARCH UNREASONABLE: EVIDENCE NONETHELESS ADMITTED

**R. v. Pniak, 2002 SKQB 202**

The accused was stopped for speeding and found to be a prohibited driver. He was arrested and Chartered for driving while prohibited and searched by an officer. Noting a bulge in his inside jacket pocket, the officer reached in and found several grams of loose marihuana. The accused stated the marihuana had been in his pocket for a long time. As the officer showed it to his Corporal, the wind blew it away. The accused was informed he was also under arrest for possession of a controlled substance. The accused's vehicle was searched and the police found three vials containing Ritalin and Talwin. The accused was then arrested for possession of a controlled substance for the purpose of trafficking. At trial, the Court of Queen's Bench judge found the search of the vehicle to be unreasonable.

### Search Incidental to Arrest

For a search to be reasonable as an incident to a lawful arrest, the search must be truly incident to arrest. In this sense, it must be made for safety or evidentiary reasons. McLellan J. held that the search of the vehicle to discover more marihuana was "purely speculative":

> The marihuana had obviously been in the accused's pocket for some time. The state of the marihuana did not suggest any recent usage by the accused. There was no suggestion that the accused appeared under the influence of any drug.

Although the police do not require reasonable grounds to believe they will locate evidence, there must be a reasonable prospect of finding evidence related to the charge. They did not and therefore had no valid purpose incidental to the arrest.

### Reasonable Grounds to Search

Warrantless vehicle searches "may be conducted in circumstances in which an officer has reasonable and probable grounds to believe the vehicle contains evidence of the commission of an offence, and exigent circumstances will not permit the obtaining of a search warrant". Acting on a mere suspicion is not sufficient. The police did not have reasonable grounds to believe there would likely be more marihuana in the vehicle, and even if they did, the police had control of the van and moved it to the detachment. They were not facing any urgency with respect to the van and could have obtained a warrant.

### Admission of the Evidence

Although the police violated the accused's right to be secure against unreasonable search or seizure, the breach was minimal. A person's expectation of privacy with respect to a vehicle is less than a home or their person and more so when the vehicle is in the control of the police. The accused was lawfully arrested and

was the search was not obtrusive even though it was based on only suspicion. The evidence was admitted and the accused was convicted.

Complete case available at www.lawsociety.sk.ca

## OFFICER's OPINION SUFFICIENT TO WARRANT IMPAIRED CONVICTION

**R. v. Wadhams, 2002 BCSC 852**

A police officer, who observed the accused stumble into the side of his truck, enter it, and drive away erratically, stopped him in his driveway after he exited his vehicle. The officer observed that the accused's eyes were watery and glassy, the whites were pink, his body was "rotating", and he had difficultly removing his licence from his wallet when requested. The officer also testified he could smell a faint odour of alcohol but could not state if it was coming from the accused's breath or his clothing. The officer formed the opinion that the accused was "very drunk" and a breathalyzer test was unnecessary. The accused was convicted of impaired driving but appealed to the Supreme Court of British Columbia arguing there was no evidence (such as a breathalyzer analysis, a witness testifying he consumed liquor, or an odour of alcohol on the accused's breath) that he was impaired by alcohol. In dismissing the appeal, Williamson J. held that intoxication is not such an exceptional condition that only a medical expert can diagnose it. Ordinary persons may provide their opinion that a person is drunk. He stated:

> Here the police officer formed the opinion the accused was "very drunk". He did so, [one] can assume, on the basis of the various observations he made which were consistent with a person being drunk. A drunk person is, given the normal understanding of the word, impaired by alcohol.

Complete case available at www.courts.gov.bc.ca

### Note-able Quote

*"Character is like a tree and reputation like its shadow. The shadow is what we think of it: the tree is the real thing".* Abraham Lincoln, U.S. president

## ASSAULT BY OFFICER RENDERS STATEMENT INADMISSIBLE

**R. v. Sabri,**
**(2002) Docket:C34474 (OntCA)**

The accused and his three companions were arrested by the police for murder after an undercover officer arranged to meet the accused in a parking lot. During a subsequent interview, he told the police that the victim fell to the ground after he had hit the victim in the jaw following an altercation between the two while walking on the street. During the trial *voire dire*, the accused alleged he was repeatedly assaulted and threatened by the police following his arrest, which included:

- At the scene of the arrest having his face pushed into the trunk of the police car;
- While in the police elevator being punched in the hip causing a bruise and which injured the wrist of the officer in the process; and
- In the interview room being repeatedly slapped and threatened to be sent back to Iraq along with his family if he did not tell the police what happened.

As a consequence, the accused told police what happened and then repeated his statement on video.

Although the trial judge rejected most of the accused's testimony, he concluded that the accused had been assaulted in the elevator when he was being escorted to the cell block by the two detectives. The accused was struck with such force that it bruised the accused's hip as depicted in a photograph taken the following day and caused a cut to the officer's wrist under his bracelet. Even though the officer denied hitting the accused or needing a bandage, a video recording of the officer interviewing another person an hour after the elevator incident showed the officer with a bandage on his right wrist. The bandage was then missing from the videotaped interview of the accused and the officer could not provide an explanation. Despite this finding, the trial judge concluded that the assault was not sufficiently connected to the statements to affect their voluntariness. The statements were held to be admissible and the accused was convicted of manslaughter. The accused appealed to the Ontario Court of Appeal arguing that the trial judge erred in finding his statements were voluntary.

The confessions rule requires that the Crown prove beyond a reasonable doubt that a statement given to a person in authority (police officer) was voluntary. In this case, the finding that the assault occurred was fatal to the admissibility of the statements.

### Credibility

First, the officers' credibility was adversely affected by their denial of the assault and the truthfulness of their entire evidence concerning the first interview was suspect. Moreover, this concern was amplified by the fact the accused's first statement was not recorded despite the availability of recording facilities. The trial judge did not subject the officers' credibility to the same scrutiny as that of the accused. The officer's credibility was "seriously undermined" and the burden of proving the voluntariness of the statement beyond a reasonable doubt was not satisfied.

### Voluntariness

Second, the trial judge erred in concluding that the assault was not sufficiently connected to the statements. The intervening six hours between the interview and the assault when the accused was in cells was not sufficient to break a temporal connection. The same two detectives in the elevator were the ones who interviewed the accused. There was a reasonable doubt that the statement was not made without fear of prejudice. The first statement in the interview room was not made voluntarily and should have been ruled inadmissible. Since the second recorded statement was a derivative of the first, it was also is inadmissible and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

## ARTICULABLE CAUSE VEHICLE SEIZURE REASONABLE

**R. v. Hart, 2002 BCSC 659**

The police were investigating a report by two 5 and 7 year old girls who were playing near their rural homes that they were taken and placed in car, driven to a secluded area, and were sexually assaulted. The suspect was described as a tall, slim white male, with blue eyes and blond hair pulled back in a pony tail and wearing a green jacket, black shirt, black jeans, and a large belt buckle. The vehicle driven by the suspect was described as a small grey four door with red seats, a black dash, black steering wheel, and a container between the front seat holding CD's. The following day the police attended a local restaurant at a service station complex and found the accused, who matched eight of ten suspect descriptors, seated at a table with three other persons. After speaking with the suspect, this person identified himself and indicated he drove a grey 1987 Chevrolet Spectrum that was parked in the parking lot. An officer went to the parking lot and located a 1987 four door grey Chevrolet Spectrum with dark red seat covers and a box of CD's on the front floor.

As a result, the police requested the accused accompany them to the station to provide a statement. When he told the police he would drive himself to the detachment, the officer told him they would prefer he accompany them. He agreed, returned to his companions, gave his car keys to a friend, and asked him to take the vehicle home. As the friend approached the vehicle, the police, who were watching it, told him the vehicle wasn't going anywhere. The vehicle was subsequently towed to and secured at the police identification bay. Following the interview, the accused was arrested and his clothing was seized. The next day, a search warrant was obtained for the vehicle.

A *voire dire* was held to determine the admissibility of evidence (including forensic evidence) obtained from the search of the car and the seizure of the accused's clothing. The police officers testified they did not have reasonable grounds to arrest the accused at the restaurant nor did they had enough grounds to obtain a search warrant. However, the police felt they had exigent circumstances and that they should secure the vehicle but not search it. It was not until the interview with the accused that the police felt they had reasonable grounds to obtain a search warrant. The accused argued that at the time the police seized the car in the parking lot, they did so unlawfully and committed a theft; they did not have reasonable grounds and were acting unlawfully. Further, information obtained from conversations with the accused that was subsequently ruled inadmissible (see *R. v. Hart*, 2002 BCSC 634) was used to support both the search warrant and the subsequent arrest.

### The Seizure of the Car

Warrantless seizures are prima facie unreasonable and the Crown bears the burden of proving that the seizure was reasonable. The vehicle was seized at the restaurant when the police denied the accused's friend

access to it. Although the police did not have reasonable grounds to arrest, the British Columbia Supreme Court concluded that they did have an articulable cause to detain the vehicle to preserve potential evidence while seeking judicial authorization. Parret J. stated:

> In my view, the concept of articulable cause exists in this country and, although an exercise of such power must be exceedingly rare given the parameters of the *Charter*, I find that the seizure of the accused's vehicle in the particular circumstances of this case was a valid exercise of this power.
>
> I find the seizure in the circumstances of the present case to be directly analogous to the securing of a potential crime scene while the investigation proceeds. I find that the seizure, within the first of the three prerequisites outlined by Lamer, C.J.C., in *Casalake,* [(1998), 121 C.C.C. (3d) 97 (S.C.C.)], was authorized by law.
>
> The authorities are legion that speak of the diminished or lower expectation of privacy that attaches to motor vehicles. When that diminished expectation of privacy is balanced against the state's interest in law enforcement and the investigation of serious offences, the balance, in this instance, falls very much on the side of the authorities. In addition, the seizure in this case was utilized for the express and limited purpose of preserving potential evidence and no search was conducted until a judicial authorization was obtained on the basis of an Information to Obtain which disclosed full details of the seizure.
>
> I find that the seizure of the accused's vehicle in the unique circumstances of this case does not constitute a breach of the accused's s. 8 *Charter* rights. I further find that the seizure in the circumstances was a reasonable step taken to preserve what might well be crucial and sensitive evidence.

### The Search Warrant

The accused argued that the search warrant was "an attempt to paper over an unlawful act". Search warrants are presumed valid and the burden in challenging a warrant rests with the accused who must establish that there was no basis upon which the justice should have been satisfied in the existence of reasonable grounds. Even though the statement made by the accused was ruled inadmissible and must be excluded from the information used to support the warrant, there remained ample evidence upon which a search warrant could be properly issued. The warrant was valid and the search it authorized did not violate s.8 of the *Charter*.

### The Seizure of Clothing

The accused submitted that the arrest was founded upon the statements unlawfully obtained by the police and the arrest was therefore unlawful. As a consequence, the seizure of the accused's clothing was unreasonable and should be excluded. In describing the power of arrest, Parret J. stated:

> A peace officer is empowered by the provisions of s. 495 of the *Criminal Code* to arrest without warrant " . . . a person . . . who, on reasonable and probable grounds, he believes has committed . . . an indictable offence". There are two aspects to determining whether or not an arrest is valid; the first is a subjective belief on the part of the police officer that reasonable and probable grounds existed for the arrest; and secondly, the requirement that, viewed objectively, such grounds existed. This latter requirement is met by applying the test of whether a reasonable person standing in the shoes of the officer, would have believed that reasonable and probable grounds to make the arrest existed.

At the time of arrest, the officer believed he had reasonable grounds. Furthermore, the objective information available to the police was sufficient to constitute reasonable grounds and a reasonable person with the same information would have believed reasonable grounds existed. Although the objective criteria may have existed before the officer made the arrest, it did not affect the arrest's validity. The detention may have affected the admissibility of other conversations but it did not render the arrest invalid where proper grounds excised. The arrest and subsequent seizure of the accused's clothing incidental to the arrest was lawful.

Complete case available at www.courts.gov.bc.ca

## 8 MINUTE DELAY IN TAKING BREATH SAMPLES AS SOON AS PRACTICABLE

**R. v. Cresswell,**
**(2002) Docket:C37055 (OntCA)**

A police officer demanded the accused provide a sample of his breath into a roadside screening device. Because the device did not work, a replacement was delivered to the officer 15 minutes later and the accused failed. He was arrested for driving over 80mg% and read his right to counsel followed by the breathalyzer demand. The accused was

transported to the police station where he was permitted to call his father 8 minutes after arrival. The breathalyzer technician was taking samples from another person and 10 minutes expired between the time of this persons last sample and when the technician began the input process on the intoxilyzer in anticipation of the accused's samples. The accused provided samples of 150mg% and 140mg%. At trial, the accused was convicted of over 80mg% but appealed to the Ontario Superior Court of Justice arguing that the samples were not taken as soon as practicable and the delay was unexplained.

Hockin J. concluded that the there was only an 8 minute delay from the time the accused completed his call to his father and the time the technician began the intoxilyzer set up process. The legal test is not "the very earliest moment" and the Crown was not required to account for each minute. Further, absent express language in the *Criminal Code*, there is no requirement that a technician with two persons from whom samples are to be taken must be received at once even though the machine is technically capable of it. The accused further appealed to the Ontario Court of Appeal again contending that the samples were not taken as soon as practicable. Although the appeal court granted a new trial on a credibility issue, it held that the lower courts did not err in finding that the samples were taken "as soon as practicable" despite the eight minute delay from the end of the accused's telephone conversation and the time the set-up began

Complete case available at www.ontariocourts.on.ca

## STAY NOT WARRANTED DESPITE POLICE ASSAULT

### R. v. Madeley, (2002) Docket:C29491 (OntCA)

The accused appealed his first degree murder conviction for the shooting death of his 14 year old girlfriend's grandmother to the Ontario Court of Appeal, arguing, in part, that the trial judge should have stayed the proceedings. During an interrogation following the accused's arrest, one of the investigating officers assaulted him while demanding he reveal the whereabouts of the murder weapon. The accused told the police where he had discarded the gun and they subsequently recovered it. While the police officers discussed erasing the videotape and denying the assault, they took no action. Although, the Crown learned of the incident and disclosed a copy of the videotape to the accused, they did not disclose the police discussions about denying the incident until after the trial had proceeded. The officer who assaulted the accused subsequently plead guilty to assault and the others involved in the discussions to destroy the tape were disciplined under Ontario's *Police Services Act*. At trial, the judge excluded as evidence the videotaped interview, an audio-taped interview revealing the whereabouts of the gun, the rifle itself, and other evidence. The accused brought a motion for a stay of proceedings alleging the breaches of the accused's ss. 7 and 10(b) *Charter* rights along with the actions of the police and Crown constituted an abuse of process which impeded his ability to make full answer and defence. The trial judge concluded that the police conduct in this case, although "blatant and inexcusable", did not justify the extraordinary remedy of a stay of proceedings. On further appeal, Carthy J. for a unanimous Ontario Court of Appeal was unable to conclude that the trial judge's decision would be an injustice. The appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

## STRIP SEARCH UNREASONABLE, BUT EVIDENCE ADMITTED

### R. v. B.B., 2002 BCCA 388

A police officer received information from another officer that a previously proven reliable source told him that the accused, a young offender, was in possession of cocaine, carried it in his underpants, and would be dealing it by using a cell phone from a red Chevy Sprint registered to a "J.M.". The accused was known to the officer, from casual street sources, as a cocaine dealer and he had dealt with him on a previous file. The officer, in the company of a police cadet and civilian ride along, observed the accused later that evening driving a vehicle matching the description provided. The vehicle was stopped and found to be registered to "J.M.". As the officer approached the car, he observed the accused turn off a cell phone. The officer detained the accused under the *Controlled Drugs and Substances Act* and conducted a strip search by asking the accused to take down his pants and underwear in the car. The officer

noticed a plastic baggie, subsequently found to contain nine flaps of cocaine, in the accused's genital area. The cocaine and some cash, which was also found, were seized. The accused was arrested and charged with possession of cocaine for the purpose of trafficking. At trial, the judge found that the officer had reasonable grounds to detain and search the accused based on the detailed information received by the officer earlier that day. The informant was reliable and had previously provided useful information in the past and the events that unfolded were also consistent with the tip. Finally, there was information from the casual street sources that the accused was a drug dealer. Concerning the need for the strip search in the car, the trial judge accepted the three reasons advanced by the officer:

1. if the information had turned out to be incorrect, the accused would be on his way and would not have to be taken down to the station to be searched;
2. it was very busy and there was a limited number of officers working. The officer did not feel justified in taking the accused to the station and going through the process of booking him in; and
3. the need to protect the evidence from possible destruction by the accused during the drive to the station.

Further, the trial judge found the search was conducted in a reasonable manner. The accused remained in the car in a very dark area where there was little traffic and the officer stood in the open door of the car between the accused and anyone who may come by. The evidence was admitted and the accused was convicted. The accused appealed his conviction to the British Columbia Court of Appeal arguing, among other grounds, that the police violated the accused's rights to be free from arbitrary detention and to be secure against unreasonable search and seizure.

## Arbitrary Detention

The accused alleged that there was no evidence allowing the Court to objectively assess the reliability of the informant. Prowse J., for the unanimous court, dismissed this ground of appeal. She concluded that, although the evidence supporting reasonable grounds was borderline, the trial judge did not err:

> The detailed nature of the tip, the fact that it was provided a short time before [the accused] was spotted by [the officer], the extent to which the details of the tip were reinforced by the events as they unfolded, and the additional information possessed by [the officer] as to [the accused's] reputation as a drug dealer, were factors which the trial judge was entitled to consider in determining whether the detention was justified.

## Unreasonable Search or Seizure

In light of the Supreme Court of Canada's decision in *R. v. Golden* 2001 SCC 83[3], the accused submitted that there were no exigent circumstances to strip search the accused in the field rather than at the police station, a five minute drive away. In the absence of such grounds, it was argued the search amounted to an unreasonable search and seizure. In the case of a field strip search, the onus is on the Crown to prove that there are reasonable grounds to believe a strip search is warranted as well as exigent circumstances justifying the search be conducted on the street prior to being transported to the police station. In this case, the reasons provided by the officer were not sufficient to meet the onus, and the search was unreasonable. Prowse J. wrote:

> In my view, the reasons [the officer] gave for strip searching [the accused] at the scene, rather than at the police station did not meet the requirements for a lawful strip search as an incident of arrest set forth in *Golden*. It cannot be justification for a strip search in the field that, if the search turns out to be negative, the citizen searched can then go on his or her way. This rationale suggests that a strip search is really a way of doing detained citizens a favour by saving them a possible trip to the police station. I think it is fair to say that the majority of citizens would rather be spared the favour. In fact, the evidence here is to the effect that [the officer] was motivated by the desire to save himself a trip to the police station, if possible, in order to avoid the time and paper work which such a trip would involve. Had there been evidence of a significant need for his services at the time of this arrest, beyond the usual requirements of patrol duty, that would have been a valid consideration in determining whether exigent circumstances existed which justified a search in the field. There was, however, no such evidence of exigent circumstances here. Further, there is no evidence of a concern that [the accused] might be armed; nor is there any persuasive evidence that [the accused] could have disposed of the cocaine while being taken from his car to the police station. Presumably he would have been handcuffed in such a manner as to prevent him from removing anything from his pants. He would also have been in the custody of [the officer] and in the company of the ride-along, who could have kept him under

[3] See Volume 1 Issue 13 of this publication.

observation for the short drive to the police station.

Despite this holding, the Court nonetheless admitted the evidence:

> While I am troubled by the extent to which the admission of evidence following a *Charter* breach may be seen as trivializing the breach in a case such as this, I am unable to conclude that the admission of this evidence in these circumstances would bring the administration of justice into disrepute. It is common ground that the cocaine was real evidence which would have been discovered in any event and that its admission would not affect the fairness of the trial. There is no suggestion that [the officer] was acting in bad faith. In that regard, it is relevant that the police at that time did not have the benefit of the analysis in *Golden.* Further, the manner in which the search was carried out, although undoubtedly invasive, was such that [the accused's] privacy was protected as much as possible. In that regard, I note that [the officer] asked his ride-along partner to move out of visual range; he asked [the accused] to remove as little of his clothing as the information he had been provided as to the location of the drugs required; he did not require [the accused] to step out of the car; there was limited lighting and no passenger traffic, or evidence of other traffic, in the area at the time; and the search did not involve the use of actual force. While I would regard the breach as serious, despite these factors, I conclude that it was not sufficiently serious to warrant excluding the evidence. Certainly, I would not describe the search as a flagrant violation of [the accused's] rights.

Complete case available at www.courts.gov.bc.ca

## SENTENCE REDUCTION AS A REMEDY TO *CHARTER* BREACH REJECTED

### R. v. Carpenter, 2002 BCCA 301

The accused was charged and convicted of importing a controlled substance into Canada when he swallowed 1.3 pounds of heroin pellets in Thailand, boarded a plane, and returned to Vancouver. Although he was convicted, the Court found his rights under ss. 8 and 10(b) of the *Charter* had been violated. Although the inculpatory statement provided to the police was excluded[4], the heroin was admitted under s. 24(2) of the *Charter* and the accused received a six-year sentence. The accused appealed his sentence, in part, by arguing that the breaches that did not result in the exclusion of the heroin against him should then, as an appropriate remedy under s. 24(1) of the *Charter*, result in a reduction to his sentence.

In a two-to-one decision, the majority of the British Columbia Court of Appeal rejected this argument. Newbury J. (Smith J. concurring) held that such an approach would improperly shift the focus of sentencing from the accused and the offence he committed to the non-serious *Charter* breaches committed by the Customs officers. Sentences blunted by a *Charter* breach may well not be proportionate to the gravity of the offence or the degree of offender responsibility and would have even more serious implications if the offender is a danger to society. Newbury J. opined:

> I also have concerns that on a practical level, it would be stretching judicial resources to their limit if the door were to be opened widely to arguments of this kind in sentencing hearings. In the real world, such hearings would be prolonged and complicated by the raising of minor and even trivial allegations of Charter breaches in hopes that the result would be a reduction in sentences.

Donald J., on the other hand, concluded that the *Charter* violations should be recognized in the calculation of an appropriate sentence and result in a sentence reduction if the breach mitigated the offence or imposed a hardship. He expressed disagreement that the s. 24(2) analysis exhausted the alternatives for a *Charter* breach and precluded a reduction in sentence as a remedy. The strip search, x-rays, and laxatives provided to the accused which resulted in the *Charter* breaches were" a hardship or penalty suffered by the [accused]" for which he was not credited on sentencing. Even though the breaches did not warrant the exclusion of evidence, they must be factored into the overall punishment of the accused. Donald J. held that a reduction in sentence for the violations did not indicate a reduced culpability in the offence, but appropriately balanced the penalty so the accused would not be over-punished. He would have reduced the accused's sentence to five years.

Complete case available at www.courts.gov.bc.ca

For comments on this newsletter contact
Sgt. Mike Novakowski at the JIBC Police Academy
at (604) 528-5733 or e-mail at
mnovakowski@jibc.bc.ca

[4] See conviction appeal: R. v. Carpenter 2001 BCCA 31.